Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	DA 12-523
Emergency Communication by Amateur	)	GN Docket No. 12-91
Radio and Impediments to Amateur Radio	)	P.L. 112-96
Communications	)	

To the Commission:

COMMENTS OF FRED HOPENGARTEN

Comes now FRED HOPENGARTEN, who pursuant to P.L. 112-96 and Subpart H of Part 1 of the Commission's Rules and Regulations (47 CFR Section 1.200, *et seq.*), submits the following comments in response to the Commission's solicitation in these proceedings.

INTRODUCTION

[1] First licensed in 1956, I am the holder of call sign K1VR, as well as a member of the bar in the District of Columbia and Maine. I am the author of the books ***Antenna Zoning for the Radio Amateur***, first (1991) and second (2011) editions. For further background, see www.antennazoning.com. In the course of my practice of law, I have represented many radio amateurs restricted in their capability to participate in the Amateur Radio Service by CC&R's.

[2] Insofar as I believe that I have comments that may be useful, they are presented below in response to particular queries as numbered and lettered in this proceeding.

1. b. Under what circumstances does the Amateur Radio Service provide advantages over other communications systems in supporting emergency response or disaster relief activities? Under what circumstances does the Amateur Radio Service complement other forms of communications systems for emergency response or disaster relief?

Comment: The Amateur Radio Service has the advantage of being atomized. It is composed of small fragments, with few of those fragments requiring attachment to any key element. In the event one route goes down, radio amateurs can quickly provide a different route to convey information. The Amateur radio Service also provides a cross-over to another form of

communications system when a radio amateur is also a member of MARS, the Military Affiliate Radio Service.

1. c. What Federal Government plans, policies, and training programs involving emergency response and disaster relief currently include use of the Amateur Radio Service?

Comment: MARS.

1. d. What State, tribal, and local government plans, policies, and training programs involving emergency response and disaster relief currently include use of the Amateur Radio Service?

Comment: MEMA, the Massachusetts Emergency Management Agency, coordinates with radio amateurs buy using an amateur radio station within its Emergency Operations Center.

1. e. What changes to the Commission's emergency communications rules for the Amateur Radio Service (Part 97, Subpart E) would enhance the ability of amateur operators to support emergency and disaster response?

Comment: The problem with 47 CFR § 97.401(a) is that it looks to a time "(w)hen normal communications systems are overloaded, damaged or disrupted because a disaster has occurred, or is likely to occur, in an area where the amateur service is regulated by the FCC . . ." At such a time, it is likely to be too late to erect an antenna system capable of being effective enough for reliable communications. To permit an effective antenna system to be at the ready, Commission rules should provide a limited preemption of CC&R's so as to permit, at the least, antenna systems which do not materially intrude into the view from neighboring homes, or, better yet, antennas not visually intrusive from the public way in front of the radio amateur's living unit. The test as to whether an antenna system should be permitted should not be that the antenna system is merely visible. Before a CC&R could prohibit an antenna system, the antenna system should be "materially intrusive." There should be a safe harbor for certain categories of antenna, such as a simple wire antenna no more intrusive than a power line, telephone landline, or cable TV coax/fiberoptic cable, a flagpole no greater in height than 35 feet, or any structure permitted under the OTARD rule, 47 CFR § 1.4000. Elements of an antenna system that are not visible from the street should not be subject to ban by a CC&R at all. I therefore suggest that § 97.401 (a) be amended to read:

> So as to permit transmissions necessary to meet essential communication needs and facilitate relief actions when normal communication systems are overloaded, damaged or disrupted because a disaster has occurred, or is likely to occur, in an area where the amateur service is regulated by the FCC, common covenants and restraints of record imposed by homeowner associations, as well as any rules and regulations promulgated thereunder, must reasonably accommodate amateur radio antenna systems which are not visible from the way in front of the unit, and must allow antennas which may be visible but are not visually intrusive to neighbors as they look toward the way. Simple wire antennas no more intrusive than a power line, telephone landline, or cable TV coax/fiberoptic cable, a flagpole no greater in height than 35 feet, or any structure comparable to those permitted under the OTARD rule, 47 CFR § 1.4000, may be used for amateur radio purposes and may not be forbidden.

The rule of § 97.401 (a) presently reads:

> When normal communication systems are overloaded, damaged or disrupted because a disaster has occurred, or is likely to occur, in an area where the amateur service is regulated by the FCC, an amateur station may make transmissions necessary to meet essential communication needs and facilitate relief actions.

2.a. What private land use restrictions on residential antenna installations have amateur radio operators encountered? What information is available regarding the prevalence of such restrictions?

Comment: I have represented Asim Aziz, formerly KJ4VTE, now AA9BZ. He lives in a Toll Brothers community, Belmont Country Club, Ashburn, VA. The Declaration of Covenants and Conditions for this community reads:

> RESTRICTIONS ON USE OF LOTS AND COMMON AREA: RULES AND REGULATIONS
>
> 8.2 (l) Antenna. No exterior antenna, satellite dish or similar exterior improvement shall be maintained upon the Property without the prior written approval of the Covenants Committee; provided, however, that the Association shall not prevent access to telecommunications services in violation of applicable law. Exterior antennas, satellite dishes greater than one meter (39 inches) in diameter, or **amateur radio equipment generally will not be allowed upon the Property**; provided, however, that: (i) an Owner may install an antenna permitted by the Association's antenna rules upon prior written notice to the Covenants Committee; (ii) the Covenants Committee may approve other antennas in the appropriate circumstances; and (iii) the Covenants Committee may establish additional guidelines for antennas as technology changes. Notwithstanding the foregoing, the Board of Directors may install and maintain antennas, satellite dishes and similar equipment on the Common Area to serve the Property.

(Emphasis provided.)

There are several things to be learned from the situation at the Belmont Country Club (which has hundreds of homes).

- The community is large, and the rule affects hundreds and hundreds of homes.
- It is not just intrusive antennas that are banned. It is "amateur radio equipment generally."
- Under the wording of the rule, a radio amateur could not even have mobile equipment in his or her personal and unmarked car or truck, with or without an antenna on the vehicle.
- Under the wording of the rule, a radio amateur cannot keep a VHF or UHF handi-talkie in a brief case, or a locked safe. The wording is so restrictive that it may indeed be more restrictive than the control of guns within the community.
- No rationale for the animus against amateur radio can be found within the rules and regulations. When I contacted counsel for the community, he was unable to provide a rationale for the rule.
- When an application was made to erect a flag pole conforming under the Flag Act, 4 USC § 5, and similarly conforming under Virginia statutes § 55-513.1, which would have a dual use as a legal flag pole and an antenna, with no visible sign that it was an antenna, the dual use was denied. After a considerable tussle, the flag pole was erected, and looks like this:

No amateur radio activity has been undertaken using this flag pole, nor will any amateur radio activity be allowed by the Community Association. To my knowledge, and to that of others living in the community, no amateur radio activity has ever been allowed in the community. No reason has been produced for this rule. And yet, if this antenna were to be used as an antenna, no physical change in the community would occur. It would be the same flag pole, with nothing hanging from it, nothing mounted on it, nothing inside it, nothing beside it – but it could be used for emergency communications.

This particular radio amateur is also a member of MARS, but has been unable to join, because there are minimum participation requirements and he cannot get on the air.

As to the prevalence of such restrictions, they are so common that an entire category of antenna has arisen and is widely advertised, "flagpole antennas." In general, they look like the flagpole erected by AA9BZ, above. Here is a photo from just one manufacturer:

This is a V-84 Tornado antenna from Texas Antennas. There are others. In other words, restrictive covenants are so common that the marketplace has erupted with a wide variety of antennas to evade these commonplace covenants against amateur radio, preventing, in many cases, the emergency communications that could be provided no – zero – deleterious effects within the condominium community.

It is a horrendous public policy which encourages public-spirited citizens, who would love to be involved in emergency and other public service communications, to flout the law.

> 2.b. What criteria distinguish "unreasonable or unnecessary" private land use restrictions from reasonable and necessary restrictions? How do local circumstances, such as neighborhood density or historic significance, affect whether a private land use restriction is reasonable or necessary? How does the availability of alternative transmitting locations or power sources affect the reasonableness of a particular private land use restriction?

Comment: For the aesthetically sensitive, in a community where rights of land ownership have been conceded to a homeowner association, restrictions on visually intrusive, large, tall (taller than, for example, the ridge pole of the home – or perhaps taller than the common 35 foot height used to distinguish between construction as of right and another level of public review) may be acceptable as a matter of public policy. But where the restriction impacts life and safety, preventing emergency preparedness, the restriction is neither reasonable nor necessary. In fact, the opposite is true. It

would be totally reasonable and necessary to allow minimally intrusive antenna systems that would permit emergency preparedness.

As for the availability of alternative transmitting locations, it may well be that the information required is best found within the restrictive community, and not elsewhere. Furthermore, at the time of the emergency, it may be impossible to get to an alternative transmitting site. Finally, under the Americans with Disabilities Act, no rule should encourage discrimination against those who cannot readily transport themselves to an alternative transmitting location.

2.a. What steps can amateur radio operators take to minimize the risk that an antenna installation will encounter unreasonable or unnecessary private land use restrictions? For example, what obstacles exist to using a transmitter at a location not subject to such restrictions, or placing an antenna on a structure used by commercial mobile radio service providers or government entities?

Comment: There are many communities, I believe that Foster City, CA is one of them, where there is no such thing as a home without restrictions. In addition, for reasons of age, disability, or economic necessity, it may be impossible to avoid private land use restrictions. The obstacles to using an off-site transmitter include: landlines or internet connections may be down, age, infirmity, disability, or economic necessity.

2.e. What other impediments to enhanced Amateur Radio Service communications have amateur radio operators encountered?

One impediment that comes to mind is unnecessary setbacks that are not based on safety. Surely the matter of safety is best dealt with in the building code, for a structure that is unsafe is no safer with a 200-foot setback. Setbacks for antenna support structures should not be, by FCC-rule, a matter of zoning, and the issue of safety, a traditional police power, should be solely subject to the building codes of the individual states.

2.f. The legislation requires the Commission to identify "impediments to *enhanced* Amateur Radio Service communications."[1] What specific "enhance[ments]" to Amateur Radio Service communications have been obstructed by the impediments discussed above?

[1] *Id.* at § 6414(b)(2) (emphasis added).

Comment: Today, *enhanced* communications tends to mean digital communications. The problem is that digital communications can suffer in ways that older, analog communications did not, from fade. Where digital "handsakes" are not practicable, to overcome dropped bits, higher signal levels are required. The Commission learned this when it transitioned from analog to HDTV and found that high quality reception was reduced in area served at the same amount of output power.

[3] I hope the Commission finds these remarks useful.

Respectfully submitted,

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